

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

Notice

CC-2009-024

August 3, 2009

	Procedures for Complying with the E-Discovery Rules to the Federal	Upon incorporation
Subject:	Rules of Civil Procedure	Cancel Date: into the CCDM

Purpose

This notice announces procedures for compliance with the E-Discovery Rules of the Federal Rules of Civil Procedure and litigation assistance to the Department of Justice. These procedures are in addition to, and supplement, all procedures that otherwise apply to discovery matters in litigation involving the Internal Revenue Service. These procedures apply in all cases, except when the manager in the Office of Chief Counsel responsible for assigning the case determines that ESI will not be an issue. Such a determination shall be documented by the manager in a memorandum to the file stating the reasons for not implementing these procedures and that the Department of Justice has concurred. For a period of one year from the date of this Notice, all ESI- and IT-related issues that are potentially covered by the ESI amendments to the FRCP must be coordinated with Procedure & Administration Branches 6 and 7. At the end of this period, the guidance contained in this Notice will be re-evaluated in light of the Office's experience with the ESI discovery rules.

Discussion

Chief Counsel Notice CC-2007-007 (February 23, 2007) explained the 2006 changes to the FRCP as they relate to the discovery of electronically stored information (ESI). As explained in that earlier Notice, the amended FRCP clarifies the process and procedures for addressing ESI discovery issues. This Notice expands on and clarifies the guidelines set forth in Chief Counsel Notice CC-2007-007.

This notice specifically deals with the amended FRCP which are applicable in the federal district courts. These procedures set forth in FRCP are not required to be followed in Tax Court cases. In the event that the Tax Court requires ESI procedures pursuant to Tax Court Rule 1, the attorney should follow the procedures in this notice. Similarly, administrative proceedings may also apply the concepts embedded in the FRCP to guide their inquiry. On March 27, 2009, the Tax Court proposed amendments to the Tax Court Rules to address ESI that are similar to the FRCP applicable to ESI. A Notice addressing Counsel attorneys' obligations will be issued if the rules are adopted.

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As highlighted in Notice CC-2007-007, ESI has always been subject to discovery. The FRCP, as amended, however, focus attention on the existence and availability of ESI and establish a uniform discovery process for dealing with ESI. ESI is defined broadly in the amended FRCP to account for both present technology as well as the development of future technology.

Generally, ESI includes, but is not limited to: all e-mail and attachments, word processing documents, spreadsheets, graphics and presentation documents, images, text files, and other information stored on hard drives or removable media (e.g., desktops and portable thumb drives), meta-data, databases, instant messages, transaction logs, audio and video files, voicemail, web pages, computer logs, text messages, and backup and archived material. Because this list of ESI is not exclusive, attorneys should consult with the Service point of contact and other Counsel personnel associated with a specific case to assist in determining what other applications, systems, databases, and storage medium may have been used to ensure all potential sources of ESI are identified and searched. The Service point of contact also should assist the assigned attorney by identifying and contacting Service employees who may possess potentially relevant ESI that may be subject to the litigation hold described in this Notice.

The obligation to preserve paper and electronic records was in the FRCP prior to the 2006 amendments. The 2006 amendments, however, establish procedures applicable explicitly to ESI and provide a framework for dealing with the legal and ethical obligations to preserve evidence. Although the 2006 amendments did not change the standards for determining what is "relevant to the claim or defense of a party", the new procedures made the preservation process more visible to adversaries by requiring counsel to identify all sources of relevant materials and information. The changes in the FRCP operate to articulate the obligation to protect and preserve *relevant* electronic materials and information when it is reasonably clear that litigation will ensue. These rules expose parties to sanctions when reasonable efforts to preserve are not undertaken in a timely manner, or if undertaken, are inadequate. The duty to preserve is broader than the duty to produce, and parties must make reasonable efforts to preserve potentially relevant information. The duty to preserve applies to all relevant ESI, regardless of whether the information ultimately will be provided to the other party. For example, relevant ESI must be preserved even if the information is protected from disclosure by statute or a judicially recognized privilege.

Failure to preserve documents and ESI can result in unfavorable discovery orders, sanctions against the Government, disadvantage to the government's position in litigation or preclusion of any and all evidence in favor of the Government's position. It can also result in monetary or contempt sanctions directly against individuals who failed to take appropriate steps to locate and segregate information subject to a litigation hold.

The duty to preserve information is triggered when, based on a good faith and reasonable evaluation of the facts and circumstances, known at the time, the agency is on notice such that it can reasonably anticipate litigation or it anticipates taking action to initiate litigation. The inability of the Service and the taxpayer to reach agreement at the examination level or a failure of a case to settle in Appeals does not necessarily create a reasonable anticipation of litigation. All facts and circumstances and the history of a particular taxpayer must be considered in determining whether there is a reasonable anticipation of litigation. For example, an uncontested matter in a bankruptcy proceeding may not give rise to the need to preserve ESI under the FRCP, as the Service will not be involved in litigation at that point in time.

All business units and functions within the Service, including the Office of Chief Counsel, have an obligation to preserve and retain all relevant ESI whenever litigation is reasonably anticipated

or litigation has commenced. This obligation exists regardless of whether the legal action has been brought against or on behalf of the agency. If, for example, the Service is a plaintiff in an action in district court, the obligation to preserve ESI arises no later than when a manager within the Office of Chief Counsel, with the authority to authorize suit, issues such approval. Similarly, if, for example, the Service is a defendant in an action in district court, the obligation to preserve ESI arises when there is credible information that the agency will be the target of legal action and no later than when a complaint has been served.

Service employees with knowledge of a possible threat of litigation should promptly inform their manager. The employee and manager should consult with the attorney assigned to the matter in the Office of Chief Counsel, or a manager in the appropriate litigation function within the Office of Chief Counsel if an attorney is not already assigned to the matter, who should consider the facts and circumstances to determine whether and when to implement a litigation hold. Similarly, a Chief Counsel attorney with knowledge of a possible threat of litigation should promptly inform his manager, who should consider the facts and circumstances and consult with the appropriate litigation function within the Office of Chief Counsel to determine whether and when to implement a litigation hold.

When litigation is initiated or is reasonably anticipated a “litigation hold” on relevant or potentially relevant ESI must be established and the steps taken in this regard must be fully documented. The obligations under a litigation hold to search, identify, preserve, and isolate ESI related to specific, predictable, and identifiable litigation supersedes all records management policies that would otherwise result in the alteration or destruction of ESI.

The timing of the initial litigation hold will depend on the type of matter.

a. *Service as Plaintiff:* A notice of a litigation hold should be issued no later than when a manager within the Office of Chief Counsel, with the authority to authorize suit, issues approval to proceed. Note, however, that a litigation hold may be appropriate at an earlier time depending on the state of the case consideration, the positions of the parties, the quality of the available evidence, and other circumstances. For example, depending on the facts and circumstances of a particular case, a notice of litigation hold may need to be issued when a business unit forwards a request to bring suit to a Chief Counsel office. The Counsel attorney should consult on a regular basis with supervisors to determine when a litigation hold is necessary in a particular matter.

b. *Service as Defendant:* Counsel attorneys must begin implementing the litigation hold procedures in this Notice when a filed complaint has been received by a manager for assignment to a Counsel attorney, *i.e.*, generally within seven business days as outlined below.

Chief Counsel attorneys are the primary contact for Department of Justice attorneys in a docketed case in district court. To meet their ethical and professional obligations and provide accurate information to the Department of Justice, Chief Counsel attorneys must identify the Service and Chief Counsel personnel associated with a particular case and coordinate with these individuals to determine what, if any, ESI was created. See *United Medical Supply Co. v. United States*, 77 Fed. Cl. 257 (2007) (government was sanctioned for the spoliation of evidence, in part, because agency counsel repeatedly failed to ensure the litigation hold notice was properly sent and received and made no attempt to follow up when a recipient failed to respond); *Zublake v. UBS Warburg, LLC*, 229 F.R.D. 422 (2004) (employer was sanctioned for the destruction of evidence, in part, because “counsel failed to properly oversee UBS ... both in

terms of its duty to locate relevant information and its duty to preserve and timely produce that information.”). To facilitate this search, this Notice provides Chief Counsel attorneys with an outline of the steps that must be taken to search for, identify, isolate, and preserve potentially relevant ESI. The information gathered by the Counsel attorney regarding the types of ESI created and the systems used will be essential for IT to conduct a diligent search to isolate and preserve potentially relevant ESI.

Prior to the initial conference between the parties under FRCP 26(f) in which the parties are required to discuss discovery issues, a Chief Counsel attorney assigned to a case must provide the Department of Justice trial counsel with basic ESI-related information specific to their case, whether that information is readily accessible and at what cost, and what steps have been taken to isolate and preserve the ESI potentially relevant to litigation. It is critical that the procedures in this Notice be undertaken immediately upon the commencement of litigation or when it first becomes evident that litigation can be reasonably anticipated, as indicated above. Employees of the Records and Information Management Program under Agency-Wide Shared Services are available to assist Chief Counsel attorneys to ensure a litigation hold for paper and electronic records is implemented properly and that applicable retention schedules are suspended.

Procedure & Administration Branches 6 and 7 will facilitate communications with the Records and Information Management Program during the implementation of the procedures outlined in this Notice.

When an assigned attorney receives a letter from the Department of Justice requesting that a litigation hold be put in place, the assigned attorney should contact the sender and seek to clarify what ESI is relevant to the pending litigation. Counsel attorneys should work with the Department of Justice attorney assigned to their case to ensure that, when appropriate, the Service can limit the scope of the ESI to be identified, isolated and preserved.

If the assigned attorney is not able to get clarification from the Department of Justice within seven business days from the receipt of the litigation hold request from the Department of Justice, then the ESI Identification and Litigation Hold Procedures outlined below should be undertaken immediately, and then later revised, as necessary, to ensure compliance with the Service’s obligations under the FRCP.

ESI Identification and Litigation Hold Procedures

The following steps must be followed to ensure the Service has met its obligations under the FRCP. Copies of the litigation hold notifications regarding the litigation hold should be sent to the Area Records Manager (see IRM 1.15.1.7.3) to ensure that the applicable record retention schedules are suspended.

Every step of the process described in this Notice must be fully documented in writing, from the initial notification regarding litigation or the potential for litigation through the actual collection of ESI and the production of the ESI to the Department of Justice trial attorney, because all individuals involved in searching, identifying, isolating, and preserving ESI in a case may be required to provide a detailed declaration regarding their efforts to comply with the ESI discovery rules and may be required to testify regarding their efforts.

The issuance of a litigation hold is not necessarily a one-time event. The assigned attorney must identify and provide the Notice of Litigation Hold initially to the Service point of contact who may possess *at that time* relevant records and information. The assigned attorney must also identify and directly provide the Notice of Litigation Hold to those Counsel employees who may

possess relevant ESI. As the assigned attorney becomes aware of additional personnel involved in the matter, the Notice of Litigation Hold should be delivered to those people through the procedures described below.

Step 1. Identification

Once litigation is reasonably anticipated or if ESI will be an issue in a case that has actually been commenced, e-mail notification must be sent to any Chief Counsel attorney, including those in the National Office, and the identified Service point of contact who was associated with the matter that is the subject of the litigation or contemplated litigation. The assigned attorney must affirmatively take steps to determine who was involved in the case.

Within seven business days of the first notification that litigation has commenced, or that litigation is reasonably anticipated, the assigned attorney must take specific affirmative steps to identify Service and Counsel employees that may possess potentially relevant ESI. The assigned attorney must document in detail what steps are taken to identify these employees. For example, the assigned attorney should:

- Consult TLCATS, TECHMIS, and other case management databases to determine whether there are any related cases with readily available contact information (e.g., a prior advisory opinion, prior court filings by the taxpayer and/or a related taxpayer, or a notice of deficiency reviewed and approved by Counsel);
- Consult IDRS transcripts, such as IMFOLT and AMDISA, to determine whether the taxpayer's account reflects which examination group conducted an audit;
- Contact the appropriate Appeals processing group to determine the location of and expected delivery date for the administrative file; and,
- If not successful in identifying employees through internal systems and resources, request that the Department of Justice Trial Attorney seek information from the opposing counsel on who in the Service was involved in the matter.

A "suspense date" tracking should be entered into the appropriate Chief Counsel database, such as TLCATS, to ensure that the assigned attorney has taken reasonable and timely steps to identify and contact those Chief Counsel and Service employees who may possess potentially relevant ESI. The "suspense date" should be initially set for seven business days after a filed complaint is received by a manager for assignment to a Counsel attorney or when it is determined that litigation is reasonably anticipated. If the assigned attorney is unable to complete this Step 1 process within seven business days, the assigned attorney should request an extension of time from the attorney's manager and document in writing why an extension is needed and what efforts have been undertaken to obtain the information. The attorney must fully document what follow-up steps were taken to ascertain this information and continue efforts to identify those employees until identification is made. This documentation is critical, as it may serve as the basis to explain the agency's efforts to preserve information in court filings where relevant ESI was destroyed prior to the litigation hold being put in place or where the opposing party questions the agency's diligence in conducting a search. The assigned attorney's immediate manager must approve the request for extension in writing.

If the assigned attorney is unable to identify within 7 business days which Service and Counsel employees may possess relevant ESI, the attorney must fully document what follow-up steps they have taken to ascertain this information and continue efforts to identify those employees until identification is made.

The assigned attorney is responsible for issuing litigation hold notifications directly to those Counsel employees who may possess relevant ESI. Also, the assigned attorney must issue a litigation hold notification either to the identified Service point of contact or directly to Service employees who may possess relevant ESI if a point of contact is not identified. The Service point of contact is an employee within the IRS who is most familiar and involved in the case, and who would have knowledge about other Service or Counsel employees who may possess relevant ESI. Examples of an appropriate Service point of contact would include: 1) an examiner's Group Manager, or 2) for an examination involving a large number of employees, the team coordinator. The litigation hold notification procedures are described in more detail below.

Step 2. Notification

Immediately upon identifying a Service point of contact or Counsel employee who may possess relevant ESI, the attorney should send to each person an initial e-mail notification. See Exhibit 1 for a template of this first e-mail notification. The first e-mail should notify the recipient that a litigation hold is in effect. The notification should inform the recipient of the litigation, or anticipated litigation, including the specific time frame in question, the subject matter (e.g. type of tax, examination issue, collection issue, employment dispute), and any other facts from the pleading or case file that would allow the Service point of contact to determine whether the Service point of contact or another Service employee created, are in possession of, or have knowledge of ESI that is relevant to the case. The e-mail should instruct the recipient that no ESI should be altered or destroyed until notified in writing that the litigation hold has been lifted. The e-mail notification to the Service point of contact should also advise that the Service point of contact should also forward the litigation hold notice to any other Service employees who may possess relevant ESI. Finally, the e-mail should advise the recipient to respond within seven business days acknowledging receipt of the e-mail notification and identifying the names and contact information for any other Counsel or Service employees who may possess relevant ESI.

A second e-mail must be sent to Counsel employees who affirmatively acknowledged that they possess potentially relevant ESI. A second e-mail must also be sent to the Service point of contact after the contact responds to the first e-mail notification. See Exhibit 2 for a template of this second e-mail notification. This e-mail should be sent within five business days of receipt of the initial response under Step 2. The second e-mail is intended to gather further, more specific, information regarding the ESI identified by Counsel employees and the Service point of contact. This e-mail also should require a response within ten business days. In this e-mail, Counsel employees and the Service point of contact should be directed to search, identify, isolate, and preserve all relevant ESI in their possession or under their control. The Service point of contact should also be directed to immediately forward this second e-mail notification (with a copy to the assigned attorney) to all employees who the point of contact identified as possessing relevant ESI with instructions to complete the questionnaire. When employees with relevant ESI are not able to search, identify, isolate, and preserve the ESI they should be instructed to contact the assigned attorney immediately. This e-mail must instruct Counsel employees, the Service point of contact and other Service employees to provide specific information regarding their search for ESI, including location, search method used, results, what steps were taken to preserve the ESI, and what was done to isolate it.

Preservation of ESI means it should not be altered, destroyed, or removed from its existing location until such time that it has been isolated and preserved for purposes of the litigation. This means that the Service point of contact must ensure that all retention schedules related to relevant ESI are suspended in order that the ESI not be destroyed after the initial notification is

sent, and also includes notifying the known impacted employees of their obligations to not destroy ESI. The assigned attorney must also ensure that all retention schedules related to relevant ESI in possession of Counsel employees also are suspended so that ESI is not destroyed. Step 3 outlines the process for contacting IT personnel to request that ESI identified by employees during this step be isolated and preserved to ensure the preservation of meta-data and in recognition that we may be required to produce the ESI in its native format.

It is incumbent upon the assigned attorney to ensure an e-mail response is received from Counsel employees and the Service point of contact. The Service point of contact should forward to the assigned attorney responses to the second e-mail received from identified Service employees. If a timely response is not received within the specified time, the assigned attorney shall resend the e-mail to the non-responsive Counsel employee or the Service point of contact with a copy to the employee's immediate manager. These e-mail notifications should continue to be elevated until such time as a response is received. The assigned attorney must consult with the attorney's manager before elevating an e-mail notification to the level of Area Director or higher. The assigned attorney also should follow up with telephone calls when necessary and document the call accordingly.

Furthermore, the assigned attorney must be prepared to assist the Service point of contact with any identified problems in communicating the search and hold procedures to other Service employees. This may include elevating identified problems to the appropriate Service and Counsel managers.

Step 3. Contacting the IT Function

Once employees identified in Step 1 provide information in response to the second e-mail (Step 2) confirming their creation of ESI and the type of ESI created, the assigned attorney should complete an ESI search request form within five business days addressed to the Office of the Chief Technology Officer (CTO). See Exhibit 3 for a template. The search request form must be completed in order to provide IT personnel with sufficient, relevant information about the case to allow them to run a search of systems and/or databases to find available potentially relevant ESI. It is important that the assigned attorney provide search terms or key words to be used in the search based on the litigation (or anticipated litigation), as ESI may not always have the name of the taxpayer, SSN or EIN, or tax year or other unique identifying terms to allow the document to be readily captured by a search. One search form should be submitted for each employee identified as having created ESI in the case.

Completed forms should be submitted to Procedure & Administration Branches 6 or 7 for review and further coordination with the Service's Office of the Chief Technology Officer to initiate the search. Procedure & Administration will forward the request to the CTO by e-mail and will copy the assigned attorney on that e-mail. Responses to the search request will be provided giving detailed information as to the systems and/or databases searched and the search terms used. See Exhibit 4.

Step 4. Reminder Notices

Until the litigation hold is lifted, the assigned attorney must send an e-mail to appropriate individuals who were identified as having ESI or are responsible for storing ESI that has been isolated to remind them of their continuing obligation to preserve the material. The reminder notification must be sent, at a minimum, every six months after the second e-mail notification is sent to Counsel employees and Service point of contact. The Service point of contact should be

instructed to forward the reminder notification to all identified Service employees. To ensure the reminder notification e-mail has been received, the assigned attorney should inform the recipient of the obligation to respond within five business days acknowledging receipt of the e-mail and providing a brief statement as to whether the ESI remains preserved and unaltered and where the information is stored. If an individual does not respond within five business days, the assigned attorney shall resend the e-mail to the Counsel employee or Service point of contact with a copy to the employee's immediate manager. The Service point of contact should follow the same procedure if an identified Service employee does not respond within five business days.

A "suspense date" reminder in TLCATS should be created every six months establishing a new reminder date six months hence to ensure the assigned attorney is aware of their obligation to send this reminder notice every six months.

Step 5. When an employee has changed jobs or has left Chief Counsel's office or the Service

When a Chief Counsel attorney or Service employee worked on a case that is subject to these procedures, but is no longer with Chief Counsel's office or the Service, the assigned attorney must contact the former employee's manager to determine whether any ESI was created and where that ESI may now be located. The manager should be able to answer basic questions regarding the types of applications and programs used by employees, as well as provide information as to the retention of ESI created by the former employee. These procedures should also be followed when an employee is not currently employed in the same capacity or location as when the ESI was created or after that employee has been contacted under these procedures to ensure that all relevant ESI has been identified and, to the extent possible, located.

Similarly, if a Chief Counsel attorney worked on a case subject to these procedures and is no longer with the Office of Chief Counsel, the assigned attorney should carefully review the former attorney's litigation file to identify any potentially relevant ESI. If after review the assigned attorney determines that the former Counsel attorney may have generated ESI not contained in the litigation file, the assigned attorney shall contact the former Counsel attorney's manager to determine where additional relevant ESI may be located.

Step 6. Lifting the Litigation Hold

A litigation hold must remain in place until the assigned attorney receives written notification from the Department of Justice that the litigation hold has been lifted. The litigation hold may be lifted as to some or all of the ESI depending on the proceedings in a given case. If the notice from the Department of Justice does not specify to what extent the litigation hold is lifted, the assigned attorney should seek clarification immediately. Once the assigned attorney receives a clear written notice that the litigation hold is lifted, the attorney must coordinate with Procedure & Administration Branches 6 and 7 to lift the litigation hold as to the specific ESI.

Providing ESI to the Department Of Justice

The assigned attorney should consult with the assigned Department of Justice attorney after the FRCP 26(f) conference to determine how ESI will be handled in the litigation. The assigned attorney should coordinate with Procedure & Administration Branches 6 and 7 for further coordination with IT personnel to ensure ESI is provided in the format agreed to by the Department of Justice attorney.

For a period of one year from the date of this Notice, all ESI- and IT-related issues that are potentially covered by the ESI amendments to the FRCP must be coordinated with Procedure & Administration Branches 6 and 7. At the end of this period, the guidance contained in this Notice will be re-evaluated in light of the Office's experience with the ESI discovery rules.

Additionally, all issues concerning ESI or questions about this Notice should be coordinated with Branches 6 and 7 of the Office of the Associate Chief Counsel (Procedure & Administration) at (202) 622-7950 and (202) 622-4570, respectively.

/s/
Deborah A. Butler
Associate Chief Counsel
(Procedure & Administration)

Exhibit 1 – Initial Notification E-Mail
Exhibit 2 – Second Notification E-Mail
Exhibit 3 – Litigation Hold Notice and Request for Search & Preservation
Exhibit 4 – IT Search Memo

Exhibit 1 – Initial Notification E-Mail

[The Initial Notification e-mail should be sent directly to Counsel employees and also to the identified Service point of contact. If the assigned attorney cannot identify an appropriate Service point of contact, the Initial Notification e-mail must be sent directly to those Service employees identified as having any involvement in a case to notify them of the litigation hold. A copy of this e-mail should also be sent to the Area Records Manager.]

Include the paragraph below if you are sending the Initial Notification e-mail to an identified Service point of contact:

We have identified you as the appropriate Service point of contact regarding [name of case] [in which litigation is reasonably anticipated] [which is pending in _____ court]. The Service point of contact is the IRS employee who is most familiar with this case, and would have additional knowledge about other IRS employees that may also possess relevant ESI. As the Service point of contact, please forward the remainder of this e-mail to all IRS employees whom you have identified as possessing relevant ESI, and informing them of their obligation to ensure steps are put in place to preserve their electronic records. Please be aware, you must also follow the litigation hold procedures outlined below for any relevant ESI you may possess regarding this matter.

Include the remaining language below to the Service point of contact, Counsel employees, and other Service employees you are contacting directly:

You are receiving this e-mail because you have been identified as a person previously involved with [name of case] [in which litigation is reasonably anticipated] [which is pending in _____ court].

[Provide details regarding the nature of the litigation or anticipated litigation, including time periods involved and allegations or subject matter.]

Under the Federal Rules of Civil Procedure, the Service has an obligation to search, identify, preserve, and isolate all electronically stored information (ESI). Generally, ESI includes, but is not limited to: all e-mail and attachments; word processing documents, spreadsheets, graphics and presentation documents, images, text files, and other information stored on hard drives or removable media (*e.g.*, desktops and portable thumb drives), meta-data, databases, instant messages, transaction logs, audio and video files, voicemail, webpages, computer logs, text messages, and backup and archived material.

Although we do not need you to gather the ESI at this time, please ensure that steps are put in place so that this information is preserved. Under no circumstances should this information be destroyed until this litigation is completed or a litigation hold is lifted.

The destruction of ESI could result in judicial sanctions against the agency and you personally.

Please provide an e-mail response to this e-mail **within seven business days** stating that you have received notice of the litigation hold and are aware that all ESI must be preserved. If you are the Service point of contact, please identify those employees to

whom you forwarded the litigation hold notice and what role those employees had in relation to the case. Please also provide (the Service point of contact/this office) with the names and positions of anyone else you know who was involved in this case, including managers and those who may have left the Service, their positions then and now, if different.

In the event that you have received this e-mail and after a search of your records you determine that you were not involved in any way in this case (or you are not the appropriate Service point of contact), please provide an e-mail response to this e-mail **within seven business days** informing the sender you were not involved in the case or the subject matter involved in the suit.

Please feel free to contact me if you have any questions or concerns.

Exhibit 2 – Second Notification E-Mail

[After receiving responses to the Initial Notification e-mail, the assigned attorney must send a Second Notification e-mail directly to Counsel employees who affirmatively respond that they possess relevant ESI. This Second Notification e-mail must also be sent to the Service point of contact with instructions to send it to those Service employees who affirmatively responded that they may possess relevant ESI.]

Include the paragraph below in the Second Notification e-mail to the Service point of contact:

As the Service point of contact, please complete the questionnaire below and return it to me within ten business days. Also, please forward the remainder of this e-mail to those IRS employees you previously identified as possessing relevant ESI in the _____ matter, with instructions to return this information to you within ten business days. Please forward responses from identified IRS employees to me.

Include the remaining language below to the Service point of contact, Counsel employees, and other Service employees you are contacting directly:

You have acknowledged that you were involved in the _____ matter and may have documents and ESI related to this case that may be subject to discovery. Our office is sending you this e-mail to try to identify the types of ESI you may have, whether the ESI is readily accessible or whether access to the information is going to require further IT assistance and/or time, and to instruct you to search, identify, preserve and isolate the ESI. Please provide an e-mail response to this e-mail within ten business days of receiving it.

In your e-mail, please answer the following questions identifying the types of ESI you created while working on this case.

- | | | |
|---|-----|----|
| 1. E-mail and attachments | Yes | No |
| 2. Word processing documents | Yes | No |
| 3. Spreadsheets | Yes | No |
| 4. Graphics and presentation documents | Yes | No |
| 5. Images | Yes | No |
| 6. Text files | Yes | No |
| 7. Hard drives (desktops and portable thumb drives) | Yes | No |
| 8. Meta-data | Yes | No |
| 9. Databases | Yes | No |
| 10. Instant messages | Yes | No |
| 11. Transaction logs | Yes | No |
| 12. Audio and video files | Yes | No |
| 13. Voicemail | Yes | No |
| 14. Internet data | Yes | No |
| 15. Computer logs | Yes | No |
| 16. Text messages | Yes | No |
| 17. Backup and archived material. | Yes | No |

If you think that you may have any other type of ESI that is not listed here, please list it below:

_____.

Once you have identified the types of ESI you may have created, please conduct a specific search and identify any ESI to which you have access. Please send me an e-mail with a description of the results of your search.

Once located, this ESI needs to be preserved and isolated. Preservation of ESI means that the ESI cannot be altered or destroyed and must be maintained in its native format throughout the duration of the case and any appeals. This means that all normal retention schedules related to the ESI have been suspended until such time as the ESI is isolated. ESI is isolated when a mirror image of the ESI in its native format is created and moved to a separate drive, CD, or server for storage for the duration of the litigation. This office will coordinate with the IRS's IT personnel to have the ESI you identified isolated and preserved. In the mean time, do not alter or destroy the ESI. **The destruction of ESI could result in judicial sanctions against the agency and you personally.**

If you are unable to execute any steps in this process (search and identify), please contact the undersigned immediately.

Also in your e-mail response (or a separate e-mail), please answer the following questions to allow us to create a written record of your search for the file:

Identification of ESI

Hardware

- Do you work on a desktop or laptop?
- Do you store files on your desktop or on a server?
- What Microsoft office applications do you use (Word, Excel, Outlook, Access)?
- Do you have a Blackberry?
- Do you use a flash drive or other external drive or storage device (e.g. CDs)?

Software & Applications

- When working on a case, what programs or applications do you use for e-mail, case histories, word processing, or data analysis?
- How do you store these files – by name or EIN or some other identifier?
- What other IRS programs or databases did you rely on for this case (e.g., IDRS, etc.)?

Case Closing

- What is your routine practice when closing a case?
- Do you retain electronic copies of any of the draft or final documents once a case has been closed?

Please keep a detailed record of:

- All hardware searched;
- Specific ESI located, and where; and
- Search terms used.

For each of the types of ESI located, please describe the search you conducted to locate the ESI (keyword, name of taxpayer, EIN), where it was located, name of the application or program, and steps taken to preserve the ESI.

Exhibit 3 – Litigation Hold Notice and Request for Search & Preservation

Office of the Chief Technology Officer,

The Office of Chief Counsel has determined that a litigation hold should be implemented to suspend the retention schedule to prevent the destruction of ESI until such time as that information has been located and transferred in its native format for preservation. The Office of Chief Counsel is requesting a search be initiated by your office to locate, isolate, and store copies of the information in its native form requested below.

Type of Litigation: ☐ Tax ☐ Personnel ☐ Procurement ☐ Other

Requester's Information

Name:
Office
Telephone No.:
E-mail:

Alternative Contact

Name:
Office:
Telephone No.:
E-mail:

Information Requested

☐ If checked see attached list for additional information and/or search combinations.

Dates of Interest:
Employee who created ESI:
Person/firm and tax id number:
Issue:
Search Terms:
Please search for all of the above both individually and in all combinations.
Please also specifically search the following combination of terms.

Please search all systems checked:

☐ IRS E-mail Accounts ☐ CI E-mail Accounts ☐ Network Shared Drives
☐ CC E-mail Accounts ☐ Application Data Repositories ☐ Other

The employee who created the ESI informed us that the ESI was created in the following formats (e.g., e-mail, word, power point, excel, etc.), programs (e.g., RGS, TREES, etc.), or systems. Please search for all ESI of these types.

Should you have any questions regarding any of the information provided on this form, have any technical problems conducting the search, or have any suggestions as to the search parameters, please contact the requesting attorney as soon as possible.

Exhibit 4 – IT Search Memo

Date of ESI Search Request _____

Name of Attorney making the Request _____

Case Name & File Number _____

Date ESI search must be completed _____

Search was conducted by _____

Date(s) of Search _____

Search 1.

- System or database searched [Please provide detail as to the types of information that is usually stored in each location searched.]

- Search terms or method used [Please provide details as to search terms and strings used.]

- Results [Please describe the results for each search term or method separately.]

Search 2.

- System or database searched [Please provide details as to the types of information that is usually stored in each location searched.]

- Search terms or method used [Please provide details as to search terms and strings used.]

- Results [Please describe the results for each search term or method separately.]

List any systems that could not be searched and reason why search could not be completed.

Was ESI isolated in its native format?

Where is ESI being stored and who controls the storage system?

What are the costs associated with searching and retrieving the ESI?

If you are unable to conduct a search, please explain why.

If you re unable to conduct a search without the need to restore backup tapes or retrieving the information from a legacy system, please provide an explanation of what steps need to be taken to search and retrieve ESI from these sources as well as the total cost and hours needed to complete the task.
